IN THE HIGH COURT OF JUDICATURE AT

BOMBAY

ORDINARY ORIGINAL CIVIL

JURISDICTION

JUDGE'S ORDER NO.436 OF 2006
IN
EXECUTION APPLICATION NO.519 OF 2006

Ge Countrywide Consumer Financial Services Ltd. ... ... Decree-holder
(Orig. Claimant)

V/s.

Ganesh Jagannath Thanekar & anr. ... Judgment-debtor
(Orig. Respondent)

Mr.Tushar Bhavsar i/by M/s.Mohit Gadkari & Co. for Claimant.

CORAM : R.S. DALVI, J.

DATED : 14th March, 2007

ORDER :

1. The Claimant/decree holder has applied by way of the above Judge's Order, for appointment of Court Receiver under the provisions of Section 51 (d) of the Code of Civil Procedure, 1908 with power to

sell the said flat by public auction or private treaty in execution of the Award dated 30.,4.2006 obtained by them. No cause why this mode of execution is opted by the decree holder is shown. The Award is for Rs.7,74,072.79 along with interest @ 16% per annum thereon. The flat sought to be sold is secured by an equitable mortgage.

2. It is argued on behalf of the decree-holder that since 5 modes of execution are specified in section 51 of C.P.C., the decree-holder is entitled to a choice and an option and that choice is absolute and cannot be refused by court. That contention is incorrect.

3. The Division Bench of the Calcutta High Court in the case of **Hemendra Nath Roy Chowdhury vs Prakash Chandra Ghosh AIR 1932 CALCUTTA 189** considered in detail the cases that arise in execution before the C.P.C. of 1882 came to be amended by the C.P.C. of 1908 in which section 51 of the CPC came to be enacted as it now stands. The

Division Bench had occasion to consider as many as 7 cases prior to the amendment of the Code which resulted in the said Amendment of 1908. In column 1 at page 191 in that judgment, they have considered the culmination of the history of the enactment contained in section 51 clause (d) of the C.P.C thus :

> " The clause only gives legislative sanction to certain decisions under the old Code in which it was held that execution may be had by appointing a receiver where that course is more likely to benefit both the judgment debtor and the decree holder than a sale of the attached property. "

4. That was a case in which appointment of receiver was sought by continuing the possession of the attached property in the hands of the judgment debtor and for recovery of lands therefrom to satisfy the decree without further applying in execution for sale of the property. The decree of the decree holder was a simple decree for a money claim. The trial court upon recording the evidence and upon considering the provisions of section 51 of CPC observed thus :

> " Now the law is otherwise. S.51 of the present Civil Procedure Code provides for appointment of receiver as one of the modes of execution. It is a right given to a decree holder to apply for execution of a decree by appointing a receiver. It is a legal right and not a right by way of equitable execution. I do not think that there can be any reasonable objection to the exercise of such right by the decree holder. "

5. In appeal upon considering the provisions of section 51 along side the provisions contained in Order 21 Rule 11 C.P.C. as well as Order 40 Rule 1 of C.P.C the aforesaid observation and consequent order were held to be incorrect and set aside. Order 21 Rule 11 (2) laid down the contents of execution application required to be set out by the decree holder seeking to execute a decree. The provisions of Order 40 Rule 1 of C.P.C empowers a court to appoint a receiver of a property <u>whenever it is found to be just and convenient</u> pending the suit or in execution after the decree is passed. The pre-condition under Order 40 Rule 1 of C.P.C. is <u>when such appointment is found to be just and convenient</u>. It is held in the judgment in the case

of **Hemendra Nath Roy** (supra) that the term "just and convenient" must necessarily mean that equities may arise in favour of both the parties. In the case in which the equities did not arise in favour of the judgment debtor and when the decree holder merely sought possession of the receiver, his appointment in execution was held to be "entirely unjustifiable". It was observed that though the appointment of a receiver is the a mode of execution under section 51, it can only be by way of a equitable execution or indirect execution , the receiver taking place of the debtor in cases in which equitable and special considerations intervene.

6. The several cases even prior to the amendment of 1908 of C.P.C which came to be seen and referred by the court in that case deserve a special reference to understand the ambit and purpose of that specific mode of execution. The cases where receiver was appointed in execution were of the following types as laid down in that case :

(a). Where the decree holder attached the two decrees held by a judgment debtor against a third party. (Pratap Singh vs. The Delhi and London Bank Ltd. [(1908) 30 All. 393=(1908) A.W.N.164 =5 A.L.J.583.

(b). Where a decree was for maintenance charged upon an immovable property (Hemanginee Dassee vs. Kumode Chunder Dass & anr.). (1899) 26 Cal.441 = 3 C W.N.139.

(c). Where the decree was for attachment and realization of some other decree and debts. (Toolsa Goolal & ors. vs. John Antone & anr. (1887) 11 Bom.448

(d). Where the property under a decree

is in possession of the Judgment debtor subject to a charge. Lal Raindra Narain Singh vs. Mt. Sundar Bibi (AIR 1925 P.C.176 =87 I.C.295=52 I.A.262 =47All.385 (P.C.)

(e). Where the decree was for 1/3rd share in certain promissory notes under execution.(Ma Mya & anr. vs. Ma Me Kyin & anr.) AIR 1929 P.C.246 =117 P.C.29 =7Rang.388(P.C.)

(f). Where the judgment debtor was an owner with limited rights and the decree was to be satisfied from the rents, dues and profits of the property. (Wasif Ali Mirza Nawab Bahadur of Murshidabad vs. Karnani Industrial Bank Ltd.) (AIR 1931 P.C.160 =132 I.C.727 =58

I.A.215 P.C.)

(g).In a proper case, in exercise of the court's discretion for equitable execution. [(Raja) Promothanath Malia vs. H.V. Low and Co.(AIR 1930 Cal. 502 =1281.c. 97=57 Cal.964.)

(h). In case of a contract creditor not having any specified charge or any right to be paid, out of a specified fund appointment of a Court Receiver could not be made in execution. (Dharendra Krishna Deb & ors. vs. Surendra Krishna Nandi & ors. **(AIR 1930 Cal. 610=129 I.C.609).**

7. Hence, in a case of a money decree, when the judgment debtor sold the property attached and held under a certain compromise deed, yielding a

particular profit it was held by the Lordship of the Judicial Committee in the case of Rajendranaran vs Sudhali AIR 1929 PC 246 that proper remedy would be appointment of receiver for realization of rent and profits of the properties and paying the decree holder after making sufficient and adequate provisions for maintenance of judgment debtor and his family. Consequently, in the case of **Hemendra Nath Roy** (supra) when instead of applying for attachment and sale of the property, the Judgment debtor desired the Court Receiver to be appointed and to claim the lands of the property from the Court Receiver, it was held that the decree holder was not as of right and as a matter of of course entitled to apply for execution by appointment of receiver and that remedy is by way of equitable execution and can be appointed only if it was just and convenient in view of the equities in favour of both decree holder and the judgment debtor.

8. It has been held in the case of **Promothanath**

Malia H.V. Low & Co. (AIR 1930 Calcutta 502) by the Division Bench of Calcutta High Court (Per Rankin, C.J.) that before appointment of receiver by way of execution a case should be made out that ordinary execution is not advantageous. That was a case of the property being outside the territorial jurisdiction of Calcutta High Court. It was observed that though the Court had power to appoint receiver by way of execution in respect of property situated in its territorial jurisdiction, it should be careful and sparing in exercise of this power and should exercise it only on a case being made out that the appointment is necessary or advantageous. That was a case of a money suit. The objection to the receiver being appointed and possession and sale of the property was taken. The concept of "equitable execution" in English law and its misnomer in Indian law came to be considered. The court gave a chance to the decree holder to file further affidavit to show the reasons why the receiver should be appointed in

execution.

9. The later Calcutta case of **Dhirendra Singh vs Santa Sila (AIR 1969 Calcutta 406)** was the case of a charge having been created under an Award and Receiver was sought in execution without filing an independent suit. Receiver in execution was allowed to sell the charged property since the court was held to have jurisdiction to appoint a receiver.

10. In the case of Purshottamdas Gujrati vs. Lala Bajnath Prasad (AIR 1941 Calcutta 240) it has been held that when the decree holder can only exercise ordinary legal remedies at considerable risk and with doubtful results, there is justification for appointment of receiver in execution in such circumstances. That was the case of a partition suit. It was observed that it was a must for the appellants to show the properties which the plaintiff in that suit were entitled and in view of certain injunction orders passed, the attachment of some of the properties

became doubtful as contempt action could have been taken for disobeying the injunction. The property was already attached. It was doubtful whether satisfaction can be obtained if it was brought to sale. It was therefore, held that the decree holder could exercise only his ordinary legal remedies at considerable risk and with doubtful results and hence there was justification for appointment of a receiver in execution.

11. In the case of **Sunder Singh Giyani vs Lala Ganga Ram (AIR 1938 Lahore 93)**, it was held that in execution of a decree against a son on the death of his father, the court could direct the receiver to take possession of the property in the hands of the son and hence order of appointment of receiver was held not ultra virus and court could direct son to hand over the property to the receiver.

12. In the case of **Ma Mya vs Ma Me Kyin** (supra) Buddist law, under which a widow became entitled

to the entire property to the exclusion of her son upon death of her husband and was entitled to equities that arose from the fact that the step son was maintained and cared for, was considered. In that case promissory notes jointly held by the widow and step-son were properties in execution. The Privy Council held the order of the High Court at Rangoon assuming the proceeds of the promissory notes to release monies thereunder and pay other respondents, a third share of the recoveries to which they were entitled as the right way of working out the decree in a case which was by appointment of receiver for promissory notes.

13. A decree for possession of immovable property, on the other hand, has been held to be executable by appointment of Court Receiver even in the first instance and without following other modes of execution in the case of **Adhish Singh vs. Hindustan Gas Industries Ltd. [1994 NOC 250 (Cal.)]**

14. It is, therefore, seen that the execution by

appointment of Court Receiver is within the discretion of the Court. The discretion has to be judiciously exercised. The appointment of receiver in execution is one of the modes of executing the decree in a fit case. It allows the decree holder the services of an officer of the court to facilitate an otherwise ardous exercise. No decree holder can merely transfer his responsibility to have decree executed upon the shoulders of a court officer for no reason whatsoever. Each decree holder is liable to take out execution application for movable and immovable properties of the Judgment debtor by attachment and then sale in execution as the normal mode of executing his decree. The contention of the Counsel for the decree-holder that he has a choice to exercise is misconceived. The choice is granted in the interest of justice. This has to be exercised upon showing cause. The cause must be genuine, bonafide and such as to exclude other normal modes of execution. If each decree holder fails to put in his own effort to obtain the fruits of his decree and leaves it to

the Court Receiver, it would result in tremendous overloading of the work of the receiver's office. That would in turn hit hard the decree holder who in a fit case would not be able to obtain execution of his decree without the services of the receiver. That would frustrate the very purpose for which the Court Receiver is necessitated.

15. A reading of Section 51 of C.P.C. itself shows the specific instances in which the right mode of execution may be applied. It may be that the decree holder may be entitled to more than such such a mode. He must nevertheless show cause as to how he has been entitled to more than one mode. The mode in section 51 (a) can be exercised only where delivery of the specific property is specifically decreed. In such a case, decree holder not having the property attached and sold, may apply for the receiver and to deliver it to him if it would be hazardous or ardous to have it delivered himself. Though mode of execution by

attachment and sale is otherwise available, such a decree holder would not be allowed to execute the decree by attachment and sale of the property. Such cases can be multiplied. The series of cases require the court to exercise itself the discretion to see which party deserves work of the court officer. Consequently, in a case of simple money decree such as the above, appointment of Court Receiver for selling of property would tantamount to decree holder not taking out execution application for attachment and sale of the property as required of all decree holders. Allowing such special treatment would be discriminatory. In the above case, there is absolutely no cause shown for exercising the option under section 51 (d). The ordinary remedy of execution under section 51 (b) is sufficient. Hence, Judge's Order exercising the option under section 51 (d) by the decree holder cannot be signed and is dismissed. The decree holder shall follow usual procedure in execution.

(SMT. R.S. DALVI, J.)